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No. 08-648

Supreme Court, U.S.
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In The Supreme Court of the United States

JANICE BREWER,
in her official capacity as Secretary
of State of Arizona,

Petitioner,

v.

RALPH NADER and DONALD N. DAIEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF MONTANA, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, IDAHO, MICHIGAN, NEW HAMPSHIRE, OHIO, OKLAHOMA, SOUTH DAKOTA AND WYOMING IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a state residence requirement for petition circulators imposes a severe burden on political rights under the First and Fourteenth Amendments that cannot be justified by a State's interests in protecting the integrity of the petition process.

2. Whether a pre-primary filing deadline for independent candidates imposes a severe burden on political rights under the First and Fourteenth Amendments that cannot be justified by a State's interests in protecting the integrity of the petition process.

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INTEREST OF THE *AMICI CURIAE*[1]

This case asks whether state laws enacted to protect the integrity of the petition process are subject to strict scrutiny and invalidation under the First and Fourteenth Amendments. *Amici* States, like the Petitioner, require compliance with reasonable, nondiscriminatory regulations on petitioning and other electoral processes to vindicate constitutionally sufficient administrative interests. While safeguarding the petition process, state election administrators also must comply with an increasing number of election reform measures at the federal and state level, all within a calendar shortened by early voting. Due to the crucial role states play in ensuring fair and reliable elections in these changing circumstances, and the fundamental importance of electoral participants and the calendar to such elections, *Amici* States seek the resolution of both questions presented.

STATEMENT OF THE CASE

1. Arizona allows nomination of independent candidates for president and statewide public office through petition by 3 percent of the number of

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief.

unaffiliated registered voters in the state. *See* Ariz. Rev. Stat. § 16-341(E). An independent candidate may begin collecting signatures for the petition at any time, but must file the petition between 90 and 120 days before the primary election, the same deadline set for party primary candidate nominations and presidential elector appointments. *See* Ariz. Rev. Stat. §§ 341(C), 16-311(A), 16-344(A). Only registered voters may sign petitions, but signatures may be witnessed and verified by any person qualified to register to vote. *See* Ariz. Rev. Stat. § 16-321(B), § 16-321(D). One of the qualifications to register to vote is residency in the State. *See* Ariz. Rev. Stat. § 16-101(A). Under these ballot-access laws, several independent candidates have gained ballot access. Pet. App. 22a.

2. Respondent Ralph Nader announced his independent candidacy for President of the United States on February 22, 2004. Pet. App. 12b.

a. Under the filing deadline, Mr. Nader had 107 days following his announcement to collect 14,694 signatures before June 9. Pet. App. 1b, 3b, 12b. Under the residency requirement, Mr. Nader could draw upon a pool of approximately 3.7 million eligible Arizona residents for his petition circulators. Pet. App. 9b. On June 9, he filed nomination petitions containing approximately 21,185 signatures, more than 90 percent of which were collected in the two weeks immediately preceding the deadline. Pet. App. 13b.

b. Within ten days after the petition filing deadline, two voters brought an action in state court to challenge a number of signatures on Mr. Nader's petitions. Pet. App. 1b-2b. The challenge cited several grounds for petition fraud, including signature forgeries by circulators and falsified addresses, in addition to other violations of state law. Pet. App. 2b. At the time set for trial, Mr. Nader announced he would withdraw his petitions and his candidacy, and the state court entered judgment enjoining the State and county election officials from placing Nader and his electors on the ballot. *Id.*

3. After withdrawing his candidacy, Mr. Nader filed this action in federal district court, seeking a preliminary injunction placing his name on the ballot and declaratory relief that the residence requirement and filing deadline are unconstitutional. Pet. App. 2b. The district court denied the application for a preliminary injunction. Pet. App. 2b. The Ninth Circuit affirmed the denial. *See Nader v. Brewer*, 386 F.3d 1168 (9th Cir. 2004).

a. Subsequently, the district court granted the State's motion for summary judgment on an undisputed record. Pet. App. 13b. The district court initially noted that "Plaintiffs offered no evidence to establish the significance of the burden imposed on them by the challenged statutes." Pet. App. 2b n.1. The district court then upheld the residence requirement as necessary to protect "the petition process from fraud and abuse, and to ensure the State's subpoena power in order to accomplish these goals."

Pet. App. 9b. The district court also upheld the filing deadline as necessary to support the State's interests "in allowing sufficient time to verify signatures, allow for challenges to petitions, and to print and distribute ballots for early and overse[a]s voting." Pet. App. 13b.

b. The Ninth Circuit reversed. Pet. App. 1a-26a. In striking down both the residence requirement and the filing deadline, the court relied upon what it considered to be "[c]ontrolling Supreme Court authority." Pet. App. 3a. First, the court held that the requirement "creates a severe burden on Nader and his out-of-state supporters' speech, voting and associational rights," and therefore, strict scrutiny is "mandated by the Supreme Court in *Buckley* [*v. American Constitutional Law Found.*, 525 U.S. 182, 194-95 (1999)]." Pet. App. 16a. Second, the court held that "the Arizona deadline imposes a severe burden on plaintiffs' rights" also warranting strict scrutiny, citing *Anderson v. Celebrezze*, 460 U.S. 780, 792, 795, 806 (1983).

The court concluded with the observation that "[t]he historical background for [election cases] changes rapidly," and that ballot-access challenges "have proved difficult for courts to evaluate." Pet. App. 26a. Notwithstanding this difficulty and the absence of evidence to establish any burden imposed by the ballot-access laws at issue, the court held that

the State did not "meet the heavy burden . . . that it must shoulder" under strict scrutiny. Pet. App. 26a.

REASONS FOR GRANTING THE WRIT

The petition for certiorari in this case should be granted on both questions. State and federal courts are divided over the constitutionality of two critical safeguards widely enacted by states to protect the integrity of their petition and electoral processes: first, residence requirements that help ensure local involvement and legal compliance by frontline petition circulators; and second, filing deadlines that provide election officials and courts the time to review the petition process and remedy fraud or other challenged defects.

As Arizona's petition explains and the decision below acknowledges, judicial review of these laws is fraught with conflicting standards for assessing the laws' burdens and justifications under this Court's precedents. Pet. App. 26a. Indeed, this Court's most recent direct authority on these issues left the question of residence requirements unanswered, *see Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 197 (1999) (assuming the constitutionality of a residence requirement), while members of this Court questioned the applicable standard of review more generally. *See id.* at 206 (Thomas, J., concurring in the judgment); *id.* at 227-28 (Rehnquist, C.J., dissenting); *id.* at 215-16 (O'Connor, J., joined by Breyer,

J., concurring in the judgment in part and dissenting in part). The Ninth Circuit's decision conflicts directly with other circuit and state supreme courts on both questions. *See, e.g.*, *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) (upholding circulator state residence requirement); *Browne v. Bayless*, 46 P.3d 416 (Ariz. 2002), *cert. denied*, 537 U.S. 1088 (upholding same petition filing deadline).

These conflicts impede states' efforts to govern the rapidly changing landscape of the petition and election process. Candidates start, and early voting ends, the electoral cycle earlier than ever. The professionalization of petition circulation has enabled more effective petition drives but also intensifies incentives for fraud and short-cuts in the signature-gathering process. Meanwhile, the number of election challenge cases has more than doubled since *Buckley*, increasing the resource demands on already strained state election administration systems. *See* Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 Stan. L. Rev. 1, 29 (2007). Resolution of the questions presented will allow states to calibrate their procedural safeguards and election calendars to respond to these and future developments.

I. STATE RESIDENCE REQUIREMENT

In *Buckley*, this Court considered the constitutionality of Colorado's laws regulating the petition process. While "[p]etition circulation . . . is core political speech, because it involves interactive

communication concerning political change," this Court also recognized "that there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley*, 525 U.S. at 186-87 (citations and quotations omitted). The Court balanced these competing interests in considering a state residence requirement. "[A]ssuming that a residence requirement would be upheld as a needful integrity-policing matter," this Court held that "the added registration requirement is not warranted." *Id.* at 197.

As the Court observed at the outset of its analysis, "our judgment is informed by other means Colorado employs to accomplish its regulatory purposes." *Id.* at 192. One of these "other means" was the residence requirement. *See id.* at 230 (Rehnquist, C.J., dissenting) ("I would not quarrel" with a holding "that a State may limit petition circulation to its own residents"); *id.* at 217 (O'Connor, J., joined by Breyer, J., concurring in the judgment in part and dissenting in part) ("I believe that the requirement that initiative petition circulators be registered voters is a permissible regulation of the electoral process.") (citation omitted); *id.* at 211 (Thomas, J., concurring in the judgment) (assuming "the State has a compelling interest in ensuring that all circulators are residents," and agreeing that "the State's asserted interest could be more precisely achieved through a residency requirement.").

Since *Buckley*, lower courts have taken divergent paths from the Court's guidance on state residence requirements. At the same time, the predicate for residence requirements has been reinforced by a proliferation of fraud and related defects in the petition process.

1. The Ninth Circuit's invalidation of the state residence requirement deepens a federal circuit and state supreme court split on a recurring issue. The primary division lies between courts that read *Buckley* to support state residence requirements as less burdensome alternatives to disfavored voter registration requirements, and courts that extend *Buckley* to invalidate state residence requirements as severely burdensome. Nineteen states and the District of Columbia have adopted state residence requirements for petition circulators.[2]

a. The Eighth Circuit upheld a residency requirement for ballot initiatives by applying this Court's "sliding standard of review" depending on the

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[2] Alaska Stat. § 15.45.105; Ariz. Rev. Stat. §§ 16-321(D), 19-114; Cal. Elections Code §§ 102, 8451, 8066, 9021; Colo. Rev. Stat. §§ 1-4-905, 1-40-112(1); Conn. Gen. Stat. § 9-453e; D.C. Code § 1-1001.16(h)(5); Idaho Code § 34-1807; Kan. Stat. Ann. § 25-303; Me. Const. Art. IV, Pt. 3, § 20; Mich. Comp. Laws § 168.544(c); Miss. Const. Art. 15, § 273(12); Mo. Rev. Stat. § 115.325(2); Mont. Code Ann. § 13-27-102(2)(a); Neb. Rev. Stat. Ann. § 32-629(2); N.D. Const. Art. III, § 2; N.D.C.C. § 16.1-01-09(3), § 3; Ohio Rev. Code § 3503.06; Okla. Stat. tit. 34, § 3.1; Pa. Stat. Ann. tit. 25 § 2911(d); S.D. Cod. L. § 12-1-3 (9); Wyo. Stat. § 22-24-107(a).

severity of burden imposed. *Initiative & Referendum Inst. v. Jaeger* at 616 (8th Cir. 2001), *citing Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997). North Dakota presented a hybrid situation where petition circulation is limited to "qualified electors," but all residents over 18 years of age qualify as electors, a significant difference from the Colorado law in *Buckley*. *Jaeger*, 241 F.3d at 616-17. Moreover, the court observed that "many alternative means remain to non-residents who wish to communicate their views on initiative measures," including campaigning and direct communication to voters on particular measures, training residents on the issues and petition circulation, and accompanying circulators. *Id.*

Several more courts, led by the Second Circuit, have relied on *Buckley*'s assumption that state residence requirements are constitutional to invalidate more restrictive local residence or registration requirements. In *Lerman v. Board of Elections*, 232 F.3d 135 (2d Cir. 2000), the court invalidated a local residence requirement partly because "the state's purpose is already served" by a state residence requirement. *Id.* at 150.

The Supreme Judicial Court of Maine reached the same result as the Eighth Circuit under strict scrutiny, holding that any burden "is justified by the State's compelling state interest in protecting the integrity of the initiative process, and the residency requirement set forth in the Maine Constitution is narrowly tailored to serve that interest." *Hart v. Secretary of State*, 715 A.2d 165, 168 (Me. 1998).

Although that case was decided pre-*Buckley*, a federal district court rejected a post-*Buckley* challenge to Maine's residence requirement, *Initiative & Referendum Inst. v. Secretary of State*, 1999 U.S. Dist. LEXIS 22071, *50-51 (D. Me. Apr. 23, 1999), and the state supreme court declined to reconsider *Hart*, *Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 78 (Me. 2002).

Since *Buckley*, at least three other federal courts, including a district within the Ninth Circuit, have followed *Hart* or *Jaeger* in upholding residence requirements. *See Yes on Term Limits v. Savage*, 2007 U.S. Dist. LEXIS 66432, *32-33 (W.D. Okla. Sept. 7, 2007) (applying strict scrutiny, holding "the residency requirement is narrowly tailored to serve Oklahoma's compelling interest in preserving the integrity of the petition process and policing that process"); *Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1164 (D. Idaho 2001) (applying lesser scrutiny, holding a residence requirement for ballot initiative petition circulators "passes muster under the reasonableness test" because "[n]on-residents are still free to speak to voters regarding particular measures and may train residents on the best way to collect signatures."); *Kean v. Clark*, 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999) (applying strict scrutiny, holding a residence requirement "is constitutional because it is narrowly tailored to the aim of preventing campaign fraud.").

b. The Ninth Circuit reached the opposite conclusion in this case, which it believed "to be mandated by the Supreme Court in *Buckley*." Pet. App.

16a. While the court acknowledged conflicting authority in passing, Pet. App. 18a (*citing Jaeger*) & 19a (*citing Kean*), it relied on the Seventh Circuit's invalidation of a *district voter registration* requirement. Pet. App. 17a, *citing Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). In fact, Krislov complained that the registration requirement "prevented him from using large numbers of non-registered *residents* to circulate his petitions." *Id.* at 857 (emphasis added). Still, like the Ninth Circuit, the Seventh Circuit held (without direct citation to *Buckley* itself) that "the First and Fourteenth Amendments compel States to allow their candidates . . . to utilize non-residents to speak on their behalf in soliciting signatures for ballot access petitions." *Id.* at 866; *see also Frami v. Ponto*, 255 F. Supp. 2d 962, 970 (W.D. Wis. 2003) (invalidating Wisconsin's residence requirement); *but see Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (conservatively estimating circulators necessary to qualify as a presidential candidate in Illinois, noting that "[i]f Nader could not recruit 100 canvassers in Illinois, his electoral prospects were dismal indeed.").

The decision below also relies on a Tenth Circuit local residence requirement case. Pet. App. 16a, *citing Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002). In *Chandler*, however, the court noted that "speculation about whether a state residency requirement would be constitutional . . . misses the point." *Id.* at 1244; *see also Yes on Term Limits*, 2007 U.S. Dist. LEXIS 66432, *28 n.20 (W.D. Okla. Sept. 7, 2007) (upholding state residency requirement, noting

that "the Court in *Chandler* took pains to distinguish the municipal residency requirement at issue in that case from a state residency requirement.").

Since the Ninth Circuit decided the case below, the Sixth Circuit has joined the circuit split on state residence requirements. *See Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) ("Blackwell violated Nader's right to use petition circulators who were not Ohio residents and registered Ohio voters."), *citing Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008). Noting "the split among the circuit courts," however, the Court held that the unconstitutionality of state residence requirements had not been clearly established for qualified immunity purposes. *Blackwell*, 545 F.3d at 477.

2. Residence requirements are common and increasingly important safeguards of the integrity of state petition processes. Although Arizona cited its history of circulator fraud and the administrative necessity of identifying, locating, and haling circulators into court on short notice, Pet. App. 8b, the Ninth Circuit dismissed these justifications because it did not see a link between redressing fraud and non-resident circulators, Pet. App. 20a. To the contrary, states have an important – and compelling – interest in enacting state residence requirements to protect the integrity of the petition process.

a. Months after the district court decision in this case, the Oklahoma Supreme Court explained that "the integrity of the initiative process in many ways hinges on the trustworthiness and veracity of the circulator" because "the Secretary and this Court have no ability to ascertain whether a particular voter actually signed a petition." *In re Initiative Petition No. 379*, 155 P.3d 32, 42 (Okla. 2006). Therefore, "residency requirements ensure that when such issues arise, the circulators will be Oklahoma residents who may be located within state lines and be subject to service for appearance in Oklahoma Courts." *Id.*

The Oklahoma court spoke from experience. It found "overwhelming evidence" of "involvement of out-of-state circulators in the signature gathering process establishing a pervasive pattern of wrongdoing and fraud." *Id.* at 34. There was "no way to determine with any sort of accuracy exactly how many signatures were collected by these out-of state residents as the petition supporters did everything possible to avoid discovery." *Id.* at 50. As a result, the court concluded that "if we do not take the opportunity to address the issue of the effect of out-of-state intrusions into a process reserved to bona fide residents of the State of Oklahoma, the problem will only grow and will present itself as a part of essentially every citizen circulation." *Id*; *cf. Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007) (rejecting federal voting rights claims in absence of state action, when "[b]y all accounts, Proposal 2 found

its way on the ballot through methods that undermine the integrity and fairness of our democratic processes.").

b. The Ninth Circuit, following the Seventh and Tenth Circuits, suggested that states could meet the compelling interest in preventing fraud by "requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement." Pet. App. 19a, *citing Chandler*, 292 F.3d at 1242-44 *and Krislov*, 226 F.3d at 866 n.7. Yet as the Oklahoma case shows, enforceable regulation depends on the basic accountability conferred by residence. The federal court reviewing Oklahoma's statute cataloged the futile attempts to assert jurisdiction of circulators and related parties in its signature challenge. *Yes on Term Limits, Inc.*, 2007 U.S. Dist. LEXIS 66432, *23-24. Trial evidence in the underlying case indicated that at least one circulator had violated the laws of four states in a single election cycle, including Oklahoma, Colorado, Missouri, and Montana. *Id.* at *19-22.

As the federal court observed, "Oklahoma's experience highlights the difficulties of policing its initiative process when non-resident circulators are used." *Id.* at *26-27. Because states must operate within an ever-narrowing window for processing petitions and printing ballots, *see* Part II below, petition challenges must be brought and litigated within strict timelines and reviewed "with dispatch." *Id.* at *27, *citing* Okla. Stat. tit. 34, § 8(E). "There is thus little time to locate and depose out-of-state circulators, particularly when [as in the instant case]

the circulators give false addresses," and "no ability to compel the presence of out-of-state witnesses at any hearing." *Id.* Given this reality, the Ninth, Seventh, and Tenth Circuit's suggestion of consent to jurisdiction is untenable. *Id.* at *29.

c. The risk of petition fraud by non-resident circulators also disenfranchises voters "who have a right to rely on the integrity of the process." *Id.* This interest goes beyond security from fraud, and includes a voter's – as well as a candidate's or initiative proponent's – reasonable expectation that any challenge to the petition process will be resolved based on facts rather than negative inferences drawn from a circulator's unavailability as a witness. Where circulators cannot be located in response to petition challenges, courts must resort to potentially sweeping petition invalidations even when the extent of fraud may be limited.

For example, in a Montana challenge to more than 64,000 signatures collected by non-resident petition circulators who had used false addresses and "bait and switch" tactics, neither the challengers nor the proponents were able to locate the suspect circulators or present them as witnesses at the challenge hearing. *See Montanans for Justice v. Montana*, 146 P.3d 759, 774 (Mont. 2006). Although the proponents sought more time for discovery, the court explained the need for "rapid action by the parties and the courts between the time an initiative qualifies for the ballot – typically in mid-July – and the date on which

voters cast ballots in the first week of November." *Id.* at 767.

Based on the testimony from fewer than a dozen voters, and the proponents' failure to present a single circulator witness to rebut or limit the fraud allegations, the Montana Supreme Court invalidated all signatures gathered by non-residents, "[a]s it was impossible to precisely identify which certified signatures were untainted by Proponents' signature gatherers' various deceptive practices." *Id.* at 776; *see also Jaeger*, 241 F.3d at 616 (citing an invalidation of over 17,000 signatures when "[t]wo Utah residents who were involved in petition irregularities left the State, and the matter was never fully resolved."); *Initiative Petition No. 379*, 155 P.3d at 34, 49 (invalidating 57,000 signatures based on negative inferences because "[t]here is no way to determine with any sort of accuracy exactly how many signatures were collected by these out-of-state residents."). The next year, in response to *Montanans for Justice*, the Montana Legislature enacted a residency requirement for petition circulators. 2007 Mont. Laws Ch. 481, § 5, *codified at* Mont. Code Ann. § 13-27-102(2).

II. PETITION FILING DEADLINE

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court cautioned that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus paper test' that will separate valid from invalid restrictions." *Id.* at 489.

Instead, a court "must first consider the character and magnitude of the asserted injury." *Id.*; *see also Williams v. Rhodes*, 393 U.S. 23, 34 (1968) (considering whether "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights"). To do otherwise and "require that the regulation be narrowly tailored to advance a compelling state interest, . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

In *Anderson*, this Court began its analysis by considering the contemporary political calendar in 1980. At the time of Ohio's March deadline, "developments in campaigns for the major-party nominations have only begun." *Id.*, 460 U.S. at 790-91. The Court highlighted the 1968 Democratic Primary, when President Johnson withdrew on March 31 and Robert F. Kennedy was assassinated on June 5. *Id.* at 790 n.11. It also observed at the time "that campaign spending and voter education occur largely during the month before an election." *Id.* at 797, *quoting Dunn v. Blumstein*, 405 U.S. 330, 358 (1972).

Based upon the spring opening to the primary season in 1968, a tragic change in the field of candidates, and a compressed general election campaign in the fall, the Court found that an independent candidate was burdened by a March filing deadline when "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in

the campaign." *Anderson*, 460 U.S. at 792. The Court weighed this finding against the State's administrative interests, agreeing that "[s]eventy-five days appears to be a reasonable time for processing the documents submitted by candidates and preparing the ballot" for party primaries, but finding no similar administrative need "to allow petition signatures to be counted and verified or to permit November general election ballots to be printed." *Id.* at 800.

Anderson was neither the first nor the last word from this Court on petition deadlines. In *Jenness v. Fortson*, 403 U.S. 431 (1971), this Court rejected a challenge to Georgia's petition requirements, noting that the second Wednesday in June was not "an unreasonably early filing deadline for candidates not endorsed by established parties." *Id.* at 438. In *Burdick v. Takushi*, 504 U.S. 428, 436 (1992), this Court approved ballot access laws that included a requirement for minor parties to petition 150 days before the September primary. As this Court has noted, "some cutoff period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges." *American Party of Tex. v. White*, 415 U.S. 767, 787 (1974).

Since *Anderson*, modern political campaigns have expanded rather than compressed the political calendar, and federal election mandates, early voting, and election litigation have increased. Now, despite these developments, lower courts effectively have resorted to a date-based "litmus-paper test" *Anderson*

cautioned against. The result has been a mixture of rigid rules applied to States that struggle to balance changing administrative demands against uncertain constitutional requirements.

1. The Ninth Circuit's invalidation of the June filing deadline contradicts the Arizona Supreme Court's holding on the identical issue. *Amici* States are aware of no other circuit court that has struck down such a late deadline on *Anderson* grounds. Twenty-five states have independent candidate petition filing deadlines in June or earlier.[3]

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[3] See Ala. Code § 17-9-3(a) (June, day of primary); Ariz. Rev. Stat. § 16-341(C); Ark. Code Ann. § 7-7-103(b) (May 1); Colo. Rev. Stat. Ann. § 1-4-303(1) (June, 140 days before general); Fla. Stat. §§ 99.061, -.0955 (May, 120 days before primary); Idaho Code Ann. §§ 34-708, -709 (March, 10th Friday before primary); 10 Ill. Comp. Stat. 5/10-6 (June, 134 days before general); Ind. Code Ann. § 3-8-6-10 (June 30); Me. Rev. Stat. Ann. tit. 21A § 354.7.B (May 27); Miss. Code Ann. § 23-15-785(2) (January, 60 days before primary); Mont. Code Ann § 13-10-503 (March, 82 days before primary); Nev. Admin. Code § 293.200 (April, 25 working days before third Monday in May); N.J. Stat. Ann. § 19:13-9 (June, day of primary); N.M. Stat. § 1-8-52.B (June, day of primary); N.C. Gen. Stat. §§ 163-122(1), -208 (June, 15 days before last Friday in June); Ohio Rev. Code Ann. § 3513.257 (March, day before primary); Okla. Stat. tit. 26 § 5-110 (first Wednesday in June); Pa. Stat. Ann. tit. 25 § 2913(c) (second Friday after April primary); S.D. Codified Laws §§ 12-7-1, -1.1 (June, first Tuesday after first Monday); Tenn. Code Ann. § 2-5-101(a)(1) (first Thursday in April); Tex. Elec. Code Ann. § 142.006 (May, 75th day after primary); Utah Code Ann. § 20A-9-503(1)(a) (March 17); Va. Code Ann. § 24.2-507 (second Tuesday in June); Wash. Rev. Code Ann. § 29A.24.050 (Friday after first Monday in June); W. Va. Code Ann. § 3-5-24 (May, day before primary).

a. In *Browne v. Bayless*, 46 P.3d 416 (2002), the Arizona Supreme Court upheld the same deadline at issue here. The court recognized important differences between the Ohio pre-primary filing date in *Anderson* and Arizona's filing date, including that a later filing date and early voting narrowed the effective period between the deadline and the election. *Id.* at 419. The court also observed that "the national political process has evolved toward a system of ever-earlier presidential primary elections with the result that, by the middle of June in an election year, the identities and positions of the major party candidates have largely been determined." *Id.* Given the changed electoral calendar, the court held candidates faced a lesser burden than in *Anderson*. *Id.* at 420. The State's need "to complete election challenge proceedings and then prepare and print the final ballot" justified that burden. *Id.*, 46 P.3d at 420. The district court in this case applied similar reasoning, acknowledging *Browne*. Pet. App. 13b n.4.

Additionally, other circuits have upheld candidate filing deadlines in June, May, and as early as March. *See Wood v. Meadows*, 207 F.3d 708, 713-14 (4th Cir. 2000) (second Tuesday in June); *Texas Indep. Party v. Kirk*, 84 F.3d 178, 185 (5th Cir. 1996) (May 12 deadline); *Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005) (March 1); *Cartwright v. Barnes*, 304 F.3d 1138, 1141 (11th Cir. 2002) (rejecting renewed challenge to June deadline at issue in *Jenness*); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740, 747 (10th Cir. 1988)

(May 31); *see also Coalition for Free & Open Elections v. McElderry*, 48 F.3d 493, 498 (10th Cir. 1995) (July 15 deadline for independent candidates and the May 31 deadline for party candidates "impose only reasonable burdens").

b. The Ninth Circuit, however, did not address *Browne* or these other cases in its decision. Instead, it found that "Nader's predicament is like that of the plaintiff in *Anderson*." Pet. App. 23a-24a. In so doing, the court treated Arizona's June deadline the same as significantly earlier deadlines invalidated by other circuits. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006) (November 3 of previous year); *Lee v. Keith,* 463 F.3d 763 (7th Cir. 2006) (December of previous year); *Council of Alternative Political Parties v. Hooks,* 121 F.3d 876 (3d Cir. 1997) (April 10); *New Alliance Party v. Hand,* 933 F.2d 1568 (11th Cir. 1991) (April 6); *cf. Cromer v. South Carolina,* 917 F.2d 819 (4th Cir. 1990) (deadline for filing statement of candidacy 200 days before general election); *but see id.* at 826 (Wilkinson, C.J., dissenting). Prior to *Anderson*, the Eighth Circuit once invalidated a June 1 petition deadline. *See McLain v. Meier*, 637 F.2d 1159, 1164 (8th Cir. 1980).

The only similarity between the decision below and most of the other cases invalidating earlier petition deadlines is that Arizona's deadline occurs before its primary election. Here, the June 9 deadline is 90 days before a September 7 primary, but still four months after Arizona's presidential preference election and after the field of major party

candidates had been settled. As the Seventh Circuit observed about the same election, "[l]ong before the June deadline it was not only certain who the major parties' candidates would be but their positions were well known, the candidates were campaigning vigorously, there was a high level of public interest in the campaign, [and] Nader himself had been campaigning since February. . . . " *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004). Still, explaining that "*Anderson* remains binding Supreme Court authority," the court refused to consider recent changes in the political calendar despite *Anderson*'s requirement that courts do exactly that. Pet. App. 22a.

2. As a consequence of the Ninth Circuit's strict scrutiny of Arizona's petition deadlines, it invalidated a key component of Arizona's and other states' integrated election calendars based on the State's ability to print ballots on a shorter timeline. Pet. App. 25a. Yet states no longer have the luxury of scheduling election calendars solely around printing ballots by the first Tuesday in November. As the Arizona Supreme Court and others have recognized, modern election calendars must accommodate the time "necessary to administer recounts, to enable judicial resolution of election challenges on the basis of fraud, to print ballots, and to mail out and receive absentee ballots." *Rainbow Coalition of Oklahoma*, 844 F.2d at 745. These processes have lengthened the election calendar since *Anderson*.

a. More than three decades ago, before the widespread adoption of early voting, this Court recognized that election administration goes beyond ballot printing; the calendar must also include time for verifying signatures and litigating challenges. *See American Party v. White*, 415 U.S. 767, 787 n.18 (1974). This process "requires pushing back the deadline for submitting petitions by increasing the amount of time required to determine whether the candidate has obtained the requisite number of valid petitions." *Keith*, 385 F.3d at 735.

As the Arizona Supreme Court explained, expediting statutes are no guarantee of expedited resolutions of petition challenges. *See Browne*, 46 P.3d at 420 ("we can take judicial notice of our own records to find that these cases do not always reach this court within [the statutory review period of] 25 days, and that ample time for a 'prompt' decision often means more than a few days."). Oklahoma's petition challenge was resolved by August 31, 2006, but only after a petition filing deadline of December 19, 2005. *In re Initiative Petition No. 379*, 155 P.3d at 35. In *Montanans for Justice*, a challenge filed August 16, 2006 was not decided by the trial and appellate courts until one week before Election Day, despite Montana's relatively late petition filing deadline of June 23. *Id.*, 146 P.3d at 764-65. By that time, most of the early, overseas and military absentee voters had cast ballots.

b. While litigation has extended the election calendar, early voting and other reforms have moved up the start of the election. Although the Arizona Supreme Court recognized that early voting shortened "[t]he effective period between the filing deadline and the election" by 33 days, *Browne*, 46 P.3d at 419, the Ninth Circuit counted the entire period up to Election Day in dismissing Arizona's administrative interests, Pet. App. 25a.

The federal Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA") has encouraged states to make absentee ballots available as early as 60 or 90 days prior to a federal general election in order to ensure sufficient transit time in military and foreign mail systems. *See* 42 U.S.C. § 1973ff-2(e), (f); *Keith*, 385 F.3d at 737. The United States Department of Justice has sued states under UOCAVA claiming "states must provide no less than thirty days for the round-trip mail transit of a ballot to overseas locations to ensure that voters have a reasonable opportunity to return the ballot in time to be counted." *See, e.g., McCain-Palin 2008 v. Cunningham*, Complaint ¶ 10, No. 3:08CV709 (E.D. Va. Nov. 14, 2008), *available at* http://www.usdoj.gov/crt/voting/misc/va_uocava_comp.php (visited Dec. 9, 2008). The Department of Defense Federal Voting Assistance Program recommends that states allow forty-five days for the round-trip transit of overseas ballots. *Id.*

Furthermore, states must accomplish far more than resolving litigation during these shortened periods. In Arizona and other states, "completed ballots must be translated into numerous Native American languages in order to comply with the Voting Rights Act." *Browne*, 46 P.3d at 420, *citing* 42 U.S.C. §§ 1973 *et seq.* The federal government also has encouraged the replacement of punch card and lever voting machines, *see* 42 U.S.C. § 15302, and regulated electronic voting systems with detailed technology standards, *see* 42 U.S.C. § 15481. Under those standards, states have implemented performance testing and certification of electronic voting systems that must occur after ballot printing but sufficiently in advance of Election Day to correct any errors. *See, e.g.,* Mont. Code Ann. § 13-17-212.

Contrary to *Anderson's* practical analysis of the election process, the Ninth Circuit's decision did not weigh these recent voting reforms, increased litigation, and an expanded campaign calendar. Its mandate, added to these other demands, will further strain local election administration for months leading up to Election Day, and force states nearer to a "one-size-fits-all" election administration system dictated by a rigid constitutional calendar.

CONCLUSION

The Court should grant the writ of certiorari on both questions presented by Petitioner State of Arizona.

Respectfully submitted,

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